AFFIRMATIVE DEFENSES IN OHIO AFTER MULLANEY v. WILBUR

I. INTRODUCTION

Prior to 1974, Ohio's treatment of affirmative defenses in criminal cases followed the common law tradition *i.e.* if a defendant intended to rely upon one of the recognized "affirmative defenses,"[1] he bore the burden of proving that defense by a preponderance of the evidence. Although this practice has often been challenged, its validity has always been recognized by the Ohio Supreme Court.[2]

Notwithstanding this history, when the Technical Committee to Study Ohio Criminal Laws and Procedure issued its proposed Ohio Criminal Code, they suggested that all affirmative defenses be codified and that the Ohio rule concerning the burden of proof on those defenses be changed. The committee recomended that Ohio adopt the federal rule *i.e.* the defendant bears the burden of initial production on affirmative defenses,[3] but once the issue is raised, the prosecution must bear the risk of non-persuasion and convince the trier of fact, beyond a reasonable doubt, that the defense is not valid.[4] In other words, the defendant would only be required to create a reasonable doubt as to the existence of a defense.

As the committee's proposal made its way through the legislative process, it engendered much debate and was the subject of significant

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[1] Since 1806, there have been no common law crimes in Ohio. Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, PROPOSED OHIO CRIMINAL CODE, Comments to the Proposed Section 2901.03 (1971) [hereinafter cited as PROP. OHIO CRIM. CODE]. Affirmative defenses, however, have never been codified. *See* PROP. OHIO CRIM. CODE, Comments to Proposed Section 2901.32. Ohio has recognized the traditional defenses of self-defense, duress, intoxication, insanity, etc., and the elements of those defenses have been judicially formulated. In addition the legislature has, in the formulation of specific offenses, delineated certain affirmative defenses or exceptions, *e.g.*, OHIO REV. CODE ANN. § 2919.01(A) (Page, 1975) [hereinafter cited as OHIO REV. CODE] (making proof of five years continous absence of a spouse a defense to a charge of bigamy).

[2] Compare the court's own listing of cases in State v. Poole, 33 Ohio St. 2d 18, 294 N.E.2d 888 (1973).

[3] As the committee noted in its comment to § 2901.05, it would be absurd to require that the prosecution negate all possible defenses in its case-in-chief since affirmative defenses are a factor in only a limited number of criminal prosecutions. In fact it may have been a consideration of this hardship that led courts to allocate the persuasion burden to the defendant. These rules were formulated at a time when the distinction between the burden of production and the persuasion burden was not generally articulated, and courts may have felt that there was only one burden on any given issue. For a discussion of the distinction, see E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 3336 (2d ed. 1974).

[4] PROP. OHIO CRIM. CODE, § 2901.05(B).

amendment.[5] When it emerged as an act of the Ohio General Assembly, almost all of the codified defenses had been deleted[6] and the treatment of the burden of proof issue was reduced to a somewhat cryptic sentence which simply stated: "The burden of going forward with the evidence of an affirmative defense is upon the accused."[7]

At a minimum, this provision requires that the defendant raise a defense which the state need not have negated in its case-in-chief, but it was unclear whether it intended to change existing law and require that the state disprove the asserted defense beyond a reasonable doubt. Professors Schroeder and Katz, in their treatise on Ohio criminal law, take the position that the provision does change existing law,[8] but it is difficult to understand why the legislature would substitute the language cited above for the clear language of the committee proposal if they intended to effectuate the change that was suggested.

The Ohio supreme court apparently saw no change in the law when it made its first interpretation of § 2901.05. On July 2, 1975, the court decided *State v. Rogers*,[9] a case in which the defendant sought to rely upon the defense of justifiable use of deadly force. Although resolution of the burden of proof issue was not absolutely necessary to the decision,[10] the court said that § 2901.05 "places the burden of going forward with the evidence [of an affirmative defense] upon the accused. . . *to prove that issue by a preponderance of the*

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[5] *See* Note, *The Proposed Affirmative Defenses of Forced Perpetration, Entrapment, Intoxication and Insanity*, 33 OHIO ST. L.J. 397 (1972) for a discussion of the proposed code as it emerged from the Ohio House. At this point, the proposed codification of defenses remained virtually intact but § 2901.05 had been changed to place the persuasion burden upon the defendant to establish insanity and intoxication by a preponderance of the evidence.

[6] OHIO REV. CODE 2901.05 defines an affirmative defense as either of the following:

(1) A defense expressly designated as affirmative;

(2) A defense involving an excuse or justification peculiarly within the knowledge of the accused . . .

The only defenses that are expressly designated are those that the legislature engrafted onto specific criminal provisions. All of the codifications dealing with the traditional defenses of duress, insanity, etc., were deleted and it must be assumed that they are included within subpart (2) and will retain their character as common law defenses.

[7] OHIO REV. CODE § 2901.05(A).

[8] 1 O. SCHRADER & L. KATZ, OHIO CRIMINAL LAW PRACTICE Tit. 29 at 14 (1974).

[9] 43 Ohio St. 2d 28, 330 N.E.2d 674 (1975).

[10] Defendant Rogers, charged with murder, sought to rely upon OHIO REV. CODE § 2935.04 which allows private citizens to make an arrest, but OHIO REV. CODE § 2935.07 requires that before making such an arrest, a citizen must inform the arrestee of his intention. Rogers conceded that he had failed to give such notice, 43 Ohio St. 2d at 32, 330 N.E.2d at 677, and so he had not even created a reasonable doubt as to the existence of a defense. In addition, since the killing had occurred in September of 1972, new § 2901.05 was not applicable. 134 OHIO LAWS 2034 (1972).

evidence."[11] Furthermore, it is interesting to note that the syllabus of the opinion repeats the requirement that the defendant must go forward with evidence of an affirmative defense but fails to mention which party bears the burden of persuasion or the quantum of proof necessary to meet that burden.[12] Because of Ohio's syllabus rule the court has not definitively answered the question of who bears the burden of persuasion on affirmative defenses.[13]

If past treatment of the issue by the courts and legislative intent were the only considerations to weigh in determining who will bear the burden of persuasion on affirmative defenses in future trials, it is likely that Ohio defendants will continue to shoulder that burden. It is the thesis of this note, however, that Ohio must add to its list of relevant considerations the United States Supreme Court's decisions in *In re Winship*[14] and *Mullaney v. Wilbur*[15] and the due process requirements which they articulate. Once these elements are added, it becomes clear that, as to certain affirmative defenses, the state may not constitutionally require the defendant to prove these defenses by a preponderance of the evidence and that as to other defenses this practice is of doubtful validity.

II. *Winship* AND *Wilbur*

When the Supreme Court decided *In re Winship* it made two separate decisions: one had a significant and immediate impact upon the treatment of juvenile defendants; the other was quietly acknowledged and deceptively obvious. First, as a prelude to its second decision, the Court found that "the Due Process Clause protects the accused [in a criminal prosecution] against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[16] This holding did not seem especially important since almost all of the states had previously

[11] 43 Ohio St. 2d at 33, 330 N.E.2d at 677 (emphasis added).

[12] *Id.* at 28, 330 N.E.2d at 675. It is interesting to note that on August 26, 1975, the Franklin Couty Court of Appeals interpreted OHIO REV. CODE § 2901.05 to require that the state must bear the burden of persuasion on affirmative defenses. The court had *Mullaney v. Wilbur* before it but found it inapplicable. The court made no mention of the Ohio Supreme Court's decision in *Rogers.* State v. Robinson, 75 AP 130, (Franklin County Court of Appeals, Aug. 26, 1975).

[13] Under Ohio law, only the points of law set out in the syllabus are considered as having the force of law. The statements made in the body of the opinion are the conclusions of the judge writing the opinion. Haas v. State, 103 Ohio St. 1,7-8, 132 N.E. 158, 159 (1921).

[14] 397 U.S. 358 (1970).

[15] 95 S. Ct. 1881 (1975).

[16] 397 U.S. 358, 364 (1970).

subscribed to that principle. It was, however, necessary to lodge this requirement in the due process clause so that the Court could go on to hold that since the New York juvenile proceeding in question was essentially a criminal prosecution, youthful defendants were entitled to have the state prove their guilt by the same degree of proof as their adult counterparts. It was this second holding on juvenile offender's rights that most impressed legal writers, and they addressed themselves to this aspect of the case while noting that the Court had in the process constitutionalized the requirement that the prosecution must prove a defendant's guilt beyond a reasonable doubt.[17] One writer noted however that "*Winship's* eventual impact may turn on the extent to which courts will insist that some specific fact. . . is a necessary element of a crime . . . ."[18]

Since that time the commentators have suggested that *Winship* must be read broadly to ensure that the criminal sanction, which is the most onerous society can levy, be used sparingly and only in appropriate cases.[19] *Winship* itself, however, did not articulate a precise test to determine what "facts" are necessary elements of any given crime. Because the state of New York was disputing only the quantum of proof required, not its responsibility to bear the persuasion burden, the Court did not have to address itself to that question. However, in explaining its decision that due process required proof beyond a reasonable doubt in all criminal prosecutions, the Court articulated concepts which helped them to answer that question when it arose in *Mullaney v. Wilbur.*

In *Winship*, the Court concluded that the guilt beyond a reasonable doubt standard was necessary to protect both the interests of the criminal defendant and society. Because of the value placed upon personal freedom and integrity, the criminal defendant must be protected against the unwarranted deprivations and stigmatization that can result from an erroneous conviction. At the same time society is interested in insuring that, to the maximum extent possible, only "guilty" persons are being convicted because individual citizens will be distrustful of a legal system that convicts an excessive number of truly innocent persons. Building upon these broad doctrines, the court in *Wilbur* offered a partial answer to the question of what constitutes a "fact" within the meaning of *Winship.*

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[17] *See, e.g.*, Comment, *Juveniles Must Be Proven Guilty Beyond a Reasonable Doubt When Accused of Criminal Violations*, 46 NOTRE DAME LAWYER 373 (1971).

[18] *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 157, 159 (1970)(footnote omitted).

[19] W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 8 at 48 (1972).

A. Wilbur's Trek to the Top

Stillman E. Wilbur, Jr. was charged with the murder of Claude Herbert. At trial the judge charged the jury that in Maine there are two kinds of homicide, murder and manslaughter; that both crimes have as elements an unlawful, *i.e.* without justification or excuse, and intentional killing; and furthermore, that if the state proves these two elements beyond a reasonable doubt the jury may find the defendant guilty of murder. The jury may convict on the lesser charge of manslaughter only if the defendant proves provocation by a preponderance of the evidence. Wilbur was found guilty of murder.[20]

Wilbur appealed to the Maine Supreme Judicial Court, arguing that the fact which distinguished murder from manslaughter was malice aforethought and that *Winship* would not allow the state to require him to disprove an element of the crime by showing provocation. The Maine supreme court rejected this, saying that Maine law recognized only one crime of felonious homicide and that manslaughter was a punishment category within that crime. The court concluded that *Winship* did not apply to a factor that was not an element of the crime, but that only served to reduce the defendant's sentence.[21]

Wilbur petitioned for a writ of habeas corpus in federal district court. The writ was granted and the state appealed to the first circuit. The court of appeals agreed with the district court, holding that murder and manslaughter were distinct crimes in Maine and that malice aforethought or the absence of provocation were elements of the crime of murder. Because malice aforethought was a fact within the meaning of the *Winship* holding, the state must prove its existence beyond a reasonable doubt.[22]

At this point, the Maine supreme court again had occasion to address itself to the murder-manslaughter distinction in *State v. Lafferty*.[23] The court disagreed with the first circuit's interpretation of Maine law and reiterated its holding that in Maine there was only one crime of felonious homocide and that the distinction between murder and manslaughter was made only for the purpose of sentencing. Since malice aforethought was not a substantive element of the offense charged, it was not a fact within the meaning of *Winship*, and the state could constitutionally require the defendant to prove provocation by a preponderance.

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[20] Mullaney v. Wilbur, 95 S. Ct. 1881, 1883-84 (1975).

[21] State v. Wilbur, 278 A.2d 139, 145-46 (Me. 1971).

[22] Wilbur v. Mullaney, 473 F.2d 943 (1973).

[23] 309 A.2d 647 (Me. 1973).

With the case in this position, the Supreme Court granted certiorari and remanded it to the first circuit for reconsideration in light of *Lafferty*.[24] The court of appeals accepted the Maine supreme court's interpretation of the law this time, but nonetheless concluded that *Winship* was still applicable.[25] The Supreme Court again granted certiorari.[26]

B. *The Opinion*

As its first order of business the Court refused to disregard the Maine supreme court's interpretation of the law of homocide and find that the crimes of murder and manslaughter are distinct. The Court said simply:

> [W]e accept as binding the Maine Supreme Judicial Court's construction of state homocide law.[27]

The issue then resolved itself into whether the state of Maine could constitutionally require a criminal defendant who is guilty of felonious homocide to prove provocation in order to reduce his punishment category from murder, which calls for life imprisonment, to manslaughter, which calls for a fine or imprisonment for a period not to exceed twenty years. First, the state argued that since provocation was not an element of felonious homocide, it was not a "fact" within the meaning of *Winship* and therefore the state need not bear the burden on that issue.[28] Second, since the jury was not to consider the provocation issue until after it had concluded that the defendant was guilty of felonious homocide, the defendant would already be subject to the stigma of a criminal conviction and would have forfeited his freedom for at least some period of time. The state reasoned that *Winship* was only concerned with the initial deprivation of freedom and stigmatization and not with the degree; therefore the state could require the defendant to prove that he was not a proper candidate for the stiffer penalty.[29]

The Court considered the general thrust of the state's argument to be misplaced, and stated that "*Winship* is concerned with substance rather than this kind of formalism."[30] The Court emphasized

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[24] 414 U.S. 1139 (1974).
[25] 496 F.2d 1303 (1974).
[26] 419 U.S. 823 (1974).
[27] 95 S. Ct. at 1886.
[28] *Id.* at 1888.
[29] *Id.* at 1889.
[30] *Id.* at 1890 (footnote omitted).

that the goal of the proof beyond a reasonable doubt standard was to protect *both* the criminal defendant and society;[31] and to obtain practical results, rather than the formal or theoretical classification of criminal sanctions into "elements" of the crime and sentencing factors. In this case, Wilbur faced either life imprisonment if sentenced for murder, or a maximum of twenty years imprisonment or a fine if sentenced for manslaughter. The only fact that determined which sanction would be imposed was the presence or absence of legally adequate provocation.

The Court went on to specifically address itself to the state's contentions. The Court first rebuffed the state's argument that *Winship* could be limited to those "facts" that the state chose to include in its definition of an offense. If such a course were allowed, the state could define a few broad classes of crimes and relegate other traditional elements into a class of facts which would be punishment factors that the defendant would have to prove if he wanted to reduce his period of incarceration.[32] To the state's second argument, the Court replied that *Winship* is concerned with degrees of deprivation and stigmatization. The Court noted that in Maine a person guilty of murder is considered to be more culpable and that as a practical matter an individual found guilty of murder will be subject to at least some loss of freedom while an individual guilty of manslaughter could conceivably be subjected to only a fine.[33]

Finally, the Court pointed out that in this case society's interest in preventing erroneous convictions was less protected than it had been in *Winship*. In *Winship* the state of New York had acknowledged its persuasion burden and only sought to use a lesser quantum of proof. In New York at least, it was *more likely than not* that the juvenile defendant was guilty, because the state had to prove guilt by a preponderance of evidence. However, in Maine, it was as *likely as not* that the defendant subject to the penalty for murder should have been subjected to the penalty for manslaughter, because the defendant had to prove provocation by a preponderance. Therefore, if the proof was equal in the jury's mind, the defendant would lose. Anytime a criminal defendant is required to raise more than a reasonable doubt as to the existence of a necessary fact, society must question the reliability of that individual's conviction.[34]

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[31] *Id.* at 1890.
[32] *Id.* at 1889-90.
[33] *Id.* at 1889.
[34] *Id.* at 1890.

The Court's opinion is not without its problems, however. While its conclusion that the substance of a given situation should govern due process rights seems correct, this in no way aids a state in determining the "substance" of any given criminal prosecution. This substance over form approach is not as much a test as a restatement of the *Winship* holding that the prosecution must bear the persuasion on all necessary "facts." It merely replaces the word "fact" with "substance," and fails to formulate a clear test to determine the substance of a crime. It is suggested that other lines of analysis implicit in the *Wilbur* opinion provide a partial answer to the question of what constitutes "substance."

First, the Court notes that this decision in no way should be interpreted as casting doubt upon the discretion of trial judges to impose varying sentences for commission of the same crime, and that proof beyond a reasonable doubt of the factors considered by the judge in making his decision is not required.[35] To distinguish the Maine situation from the normal sentencing procedure, the Court noted that in Maine the jury decided whether the murder or manslaughter sentence will be imposed and that its decision turns upon the fact of provocation; only after the jury determination does the judge impose a sentence within the statutory bounds. One can only speculate as to what the Court would have concluded if the Maine scheme only required the jury to make a finding of guilt on the charge of felonious homocide and then allowed the trial judge to consider the element of provocation when sentencing the defendant. It is suggested that the result would not have been different because it may be that the Court was more impressed with form than it acknowledged. If Maine has decided that the resolution of one factual issue is determinative of the sanction to be imposed, then it may be said that the state has decided that a factual issue must be resolved before it will impose one sanction as opposed to another. "By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*."[36]

Second, one cannot help but suspect that the Court was less

[35] *Id.* at 1889 n.23. If the degree of deprivation and stigmatization were the only criteria used to invoke the *Winship* doctrine, then any difference in the sentencing of defendants would have to be justified by proof of the determining factor. The distinguishing point present here is that the state made the presence or absence of *one* fact determinative of outcome. Compare the treatment of proof in habitual offender statutes. W. LAFAVE & A. SCOTT, *supra* note 18, at 46.

[36] 95 S. Ct. at 1889.

willing to accept Maine's interpretation of its law of homocide than it professed. Justice Powell engages in a detailed study of the distinction between murder and manslaughter at common law and concludes that:

> First, the fact at issue here—the presence or absence of the heat of passion on sudden provocation—has been, almost from the inception of the common law of homocide, the single most important factor in determining the degree of culpability attaching to an unlawful homocide. And, second, the clear trend has been toward requiring the prosecution to bear the ultimate burden of proving this fact.[37]

If the Court accepts Maine's interpretation of the law of homocide, one is hard pressed to understand why the historical growth of the law of homocide is relevant. The analysis could easily lend itself to an opinion that concludes that some distinctions in the criminal law are so basic to "fundamental fairness" that states may not, consistent with due process, do away with classifications of crime that are so engrained in our history and that differentiate between degrees of criminal culpability long recognized by society at large. It is understandable that the Court was reluctant to reach such a far-reaching decision, and on the facts of the case it was not necessary, because Maine does make a distinction between murder and manslaughter. It recognizes that those who kill with provocation are "different" from those who commit other types of homocide and it provides an alternate sanction that is similar to that of other states. The practical effect of the Maine approach is to make the murder-manslaughter distinction, albeit in an unusual fashion, and so the Court had no need to decide whether the distinction is constitutionally required. Again one can only speculate as to what the Court would have done if Maine had decided that it would no longer recognize the separate crimes of murder, voluntary manslaughter, and involuntary manslaughter and that all killings would be punished by life imprisonment. Implicit in the Court's opinion is the notion that there are some distinctions in the criminal law which *must* be made.

If the above analysis is correct, the following conclusions can be said to follow:

1. The prosecution must bear the persuasion burden beyond a reasonable doubt upon all of the issues that bear upon the degree and type of criminal culpability of the defendant, issues that must be

[37] *Id.* at 1888 (citations omitted).

resolved before a finding of blameworthiness can be made.[38] These issues would include not only the prescribed elements of a particular crime but also those facts that must be absent before a finding of guilt can be made.[39]

2. There may be some factual distinctions in the criminal law which may not be ignored constitutionally.

IV. THE EXTENSION OF *Wilbur* TO AFFIRMATIVE DEFENSES

Before proceeding to a discussion of the impact of *Wilbur* on Ohio law, it is necessary to dispense with two preliminary matters. First, the term "affirmative defense" has been applied to a broad range of legal concepts. For example, alibi is often referred to as an affirmative defense even though most jurisdictions acknowledge that alibi is no more than a denial of the commission of the criminal act.[40] As such it is simply a rebuttal of the state's case and the only persuasion burden that the defendant has is to create a reasonable doubt as to his presence at the scene of the crime.[41] The Ohio supreme court has recognized this distinction and pointed out that while alibi is commonly referred to as an affirmative defense, it would be error to charge the jury that the defendant must bear the persuasion burden by a preponderance on that issue.[42] It is submitted, however, that this indiscriminate use of the term has misled courts into assuming that because a legal construct is labelled as an "affirmative defense," the defendant must bear the persuasion burden without examining the theoretical basis for the so-called defense. This note will not attempt to formulate a rigorous definition of affirmative defense but will use the term in a loose fashion, while urging the reader to bear in mind the fluid nature of the construct.

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[38] This formulation attempts to exclude those defenses which in no way detract from the defendant's guilt or blameworthiness but are created to achieve other goals. For example, suppression of unconstitutionally obtained evidence does not deny the defendant's guilt, but only seeks to prevent enforcement officials within the criminal justice system from using reprehensible tactics.

[39] This formulation follows closely the definition of "germane issues" that Ashford and Risinger use in their analysis of presumptions. Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165, 171 (1969).

[40] At one time however, Iowa required the defendant to prove alibi by a preponderance of the evidence. This practice was declared unconstitutional even prior to *Winship*. Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968).

[41] Some might object to labelling a defendants rebuttal of the prosecution case a "burden." Tradition has taught us to think of a burden of persuasion as something greater than half, but that need not be true.

[42] Sabo v. State, 119 Ohio St. 231, 245, 163 N.E. 28, 32-33 (1928).

Second, no attempt will be made to make an in-depth analysis of the theoretical underpinnings of affirmative defenses generally or Ohio defenses in particular. It is felt that such an analysis is not necessary or wise; rather this note will follow the general classification of defenses suggested by Professors Scott and LaFave in their treatise on criminal law.[43] They note that defenses can be divided into three basic types which are grouped according to the theoretical justification for allowing a given defense. These classfications are:

> (1) Those defenses which negate some element of the crime charged, *e.g.*, mistake of fact, intoxication and possibly insanity under some formulations.
> (2) Those defenses which do not negate an element of the crime, but which offer a justification or excuse, *e.g.*, self defense, duress, and necessity.
> (3) Those defenses which the legislature has specifically denoted as either an affirmative defense or an exception when the statute was formulated.

This note will briefly sketch the justification for allowing these defenses, note an example from Ohio law, and then attempt to gauge the impact of *Wilbur* upon this class of defenses.

A. *"Negative" Defenses*

As noted in the discussion of alibi, there are those "affirmative defenses" which act only to negate one of the elements of the crime charged. In any prosecution in Ohio the state must prove that the defendant committed a voluntary act or failed to act when he had a duty to do so, and that he has the requisite degree of culpability for each element of the offense charged.[44] On these elements the prosecution has both the production burden and the persuasion burden and the quantum of the persuasion must be proof beyond a reasonable doubt.[45] If the defendant offers proof that one of these elements is not true he is seeking to raise a reasonable doubt in the juror's mind as to the truth of the state's assertion that a necessary fact is true.

Intoxication in its usual formulation is such a negative defense. For example, the crime charged may be that the defendant did "A" with intent to "B". The defendant may present evidence that because of his intoxication he either did not have the intent required or he was physically incapable of performing act "A". In most jurisdictions,

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[43] W. LAFAVE & A. SCOTT, *supra* note 18, at 46-47.
[44] OHIO REV. CODE § 2901.21.
[45] OHIO REV. CODE § 2901.05(A).

including Ohio, such evidence would be legally admissable to negate the elements of the crime. In Ohio, however, it is the rule that if the defendant would interpose the "defense" of intoxication he must prove that by a preponderance of the evidence.

In the syllabus to *Long v. State*, the supreme court held:

> Where, in the trial of a first degree murder case, the defendant asserts voluntary intoxication as a defense to the prosecution, it will be incumbent upon him to establish that degree of intoxication which rendered him incapable of forming the intent to kill, or of acting with premeditation and deliberation, and the burden is upon such defendant to establish such defense by a preponderance of the evidence. This does not, however, relieve the state of the general burden to prove each and every element going to make up the offense charged by proof beyond a reasonable doubt.[46]

Similarly, in the syllabus of *State v. French* the court said:

> Where, in a prosecution for rape, the defendant, . . . introduces evidence of intoxication to support the defense that he was physically incapable, because of such intoxication, to commit the act of rape, it is not error for the court to charge the jury that the burden is on the defendant to prove, by a preponderance of the evidence, such incapacity from such cause.[47]

A moment's reflection will reveal the odd result that such a rule produces. If defendant X is charged with intent to rape, and raises no intoxication issue, the state must prove his intent beyond a reasonable doubt, whereas if defendant Y is charged with intent to rape and alleges intoxication, he must disprove that intent by a preponderance of the evidence. Conceivably, defendant Y can be convicted if it is as likely as not that he intended rape. The inadequacy of the rule is even

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[46] 109 Ohio St. 77, 141 N.E. 691 (1923).

[47] 171 Ohio St. 501, 172 N.E.2d 613 (1961). The jury charge approved in *French* presents an interesting legal paradox.

> Defendant claims that he was so drunk at the time that according to his own testimony he could not have had an erection or have been physically able to have comitted any rape upon the prosecuting witness here * * *.
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> "If the evidence is credible, evidence of the defendant is such as to create a reasonable doubt in your minds as to his ability to commit the offense of rape, keeping in mind that penetration is an essential element of the crime of rape, then, of course, you must find him not guilty of the second count of the indictment. On the other hand, if you fail to find that he has proven this defense by a preponderance of the evidence and that the other elements which I have indicated to you have been proved by the state beyond a reasonable doubt, it would be your duty to find the defendant guilty of the second charge or the second count in the indictment.

171 Ohio St. at 502, 172 N.E.2d at 614.

clearer when intoxication is used to negate the act charged. It is very much like the alibi "defense" in that the defendant is denying that he performed the act charged.

Under *Winship* alone, this treatment of intoxication is unconstitutional. The state is not proving the defendant's guilt beyond a reasonable doubt as to every "fact necessary to constitute the crime with which he is charged."[48]

Before *Winship* constitutionalized the requirement that guilt be proved beyond a reasonable doubt, a state such as Ohio could have argued that normally the prosecution must prove every element of a crime beyond a reasonable doubt; however, when a defendant seeks to raise a disfavored defense such as intoxication, that standard may be lowered.

Little more need be said about this class of defenses except to note that in both *Long* and *French*,[49] the Ohio supreme court expressed its belief that since intoxication is not a part of the state's case, the burden must be upon the defendant. First, this stance misapprehends the nature of the intoxication defense. Second, it may reveal the confusion that can result from a failure to distinguish between the production burden and the persuasion burden. The court is correct that intoxication is not a part of the state's case and therefore it need not negate the issue before the defendant raises it. If may be, however, that the court assumed there could only be "one" burden on any issue and that since the defendant wants to interject intoxication, he should bear that burden. This is proper if it is limited to the production burden, but it does not follow that the persuasion burden must rest on the same party. Even this formulation may be too broad, since the defendant is only rebutting an issue upon which the state already has both the production and the persuasion burden.

B. *Confession and Avoidance*

If any class of defenses deserves the title of "affirmative," it is those defenses that admit the commission of the act charged with the necessary mental element, but seek to interpose the existence of a state of facts that, if true, would provide a complete exculpation. The traditional defenses of duress, necessity and self-defense are common examples. Unless one is willing to draw the concepts of volitional act and mental element quite broadly, these defenses do not negate either

[48] 397 U.S. 358, 364 (1970).

[49] 109 Ohio St. at 90-91, 141 N.E. at 695; 171 Ohio St. at 504, 172 N.E.2d at 616.

concept.[50] In that respect they are analogous to the common law of confession and avoidance; they admit the truth of the facts pleaded but offer an excuse.

The criminal law's recognition of these defenses is based upon the belief that even though the defendant's act was in violation of the criminal law, society does not believe any person would have acted differently or that the actor's behavior is excusable. Because these defenses are rather narrow and unusual exceptions to the criminal law, it is logical that the defendant should raise the issue. Not only do these defenses occur rarely, but the defendant has better knowledge of the facts constituting the defense. It is not surprising, either, that since the criminal law developed simultaneously with the civil law, the common law courts allocated the persuasion burden on these truly "affirmative defenses" to the defendant.[51]

Ohio has followed this tradition and it is the rule that self-defense,[52] duress,[53] and other excuse or justification defenses[54] be proved by the defendant by a preponderance of the evidence. The argument in favor of this rule is quite simple. Since this class of defenses in no way negates the existence of an element of the state's case it is theoretically possible for a trier of fact to conclude beyond reasonable doubt that a defendant has committed a crime but still bring in a verdict of not guilty. Since the defendant seeks to avoid the punishment called for by interposing a separate factor, it is proper for him to prove that fact.

Proponents of this rule can cite authority for their position. In 1952 the Supreme Court in *Leland v. Oregon*[55] upheld the constitutionality of an Oregon rule that required defendants to prove the defense of insanity beyond a reasonable doubt. Although not clearly articulated, it appears that the Court accepted the argument that since the insanity defense does not negate an element of the state's case, it is proper to make the defendant prove it.[56] In fact, Justice Rehnquist, in a concurring opinion in *Wilbur* said that he felt *Leland* was still valid because

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[50] It can be argued that, human nature being what it is, the actor in a self-defense situation really has no choice but to use deadly force; therefore it can be said that his act was not voluntary. This however is a far cry from the traditional formulation of a voluntary act, *i.e.*, merely a conscious, willed act.

[51] Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880, 894-910 (1968).

[52] Silvus v. State, 22 Ohio St. 90 (1871).

[53] State v. Sappienza, 84 Ohio St. 63, 95 N.E. 381 (1911).

[54] State v. Rogers, 43 Ohio St. 2d 28, 330 N.E.2d 674 (1975).

[55] 343 U.S. 790 (1952).

[56] *Id.* at 794-96.

> the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.[57]

Unless one reads "voluntary act" broadly, the same could be said of any of the "confession and avoidance" type of defenses.

Justice Rehnquist notwithstanding, the language of the majority opinion in *Wilbur* does cast some doubt upon the *Leland* holding. The majority said that they were "concerned with substance rather than . . . formalism."[58] Let us assume that a given crime consists of act "A" done with a state of mind of "B", but that under the law of the jurisdiction, fact "X" will exculpate and prevent the imposition of the criminal sanction even though A and B are true. In a practical sense, it can be said that the crime does not consist of A and B alone, but only A and B in the absence of X. No one disputes that the state may properly assume that because X is such a rare occurrence, it is not present in this case, and therefore dispense with proof of its absence. Consistent with this, the jury should receive no charge upon X and should not consider it. If however the defendant raises the issue, X becomes a fact within the meaning of *Winship*, and a reasonable doubt as to the existence of X should exculpate the defendant. As a practical matter, confession and avoidance type defenses are an element of every crime to which they may be legally asserted.

Some commentators have argued that if the state may consitutionally dispense with X as a defense, is it not appropriate to allow the state to make the defendant prove X by a preponderance of the evidence? In addition, they note that these defenses are bestowed by the "grace" of the legislature, and they may be legislatively withdrawn if the courts require the state to disprove these defenses.[59] One criticism of this viewpoint is that until such time as the legislature determines that it would be socially proper and politically safe to follow that course of action,[60] the state must live with the theoretical framework it has constructed, but that answer is less than satisfactory.

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[57] 95 S.Ct. at 1893.

[58] *Id.* at 1890.

[59] *See* Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919, 933-38; Comment, *The Constitutionality of the Common Law Presumption of Malice in Maine*, 54 B. U. L. REV. 973, 1000-01 (1974).

[60] In answering this same argument as applied to presumptions, Ashford & Risinger note that although this approach was suggested in Ferry v. Ramsey, 277 U.S. 88 (1928), the Court has never used it since. In addition, they note that it is not at all clear that the legislature would have passed a statute that did not contain the disputed defense. Ashford & Risinger, *supra* note 37, at 177-78.

Another more significant problem with this position is that in the case of the traditional defenses of duress, self-defense, etc., another answer is possible, and it questions the validity of the supposition that the state can constitutionally dispense with these defenses. As noted in the discussion of *Wilbur*, the court was concerned about the difference in the degree of culpability between murder and manslaughter in the law of Maine. How much more difference is there between the moral culpability of the individual who commits murder and the one who kills in self defense? In fact we traditionally say that the individual who kills in self-defense is not morally culpable at all. It may be that the long standing use of these traditional defenses is so engrained in our notions of social justice that any attempt to dispense with them would be blocked.[61] If this is true, then it would seem clear that under the analysis of *Wilbur* this class of defenses are a fact within the scope of the *Winship* doctrine.

C. *Statutory Exceptions*

The third general classification of affirmative defenses is those which the legislature incorporates into its formulation of a crime. For example a statute may provide that "A" and "B" are the elements of a crime, but that fact "X" is an exception, and it will prevent a conviction if present. This legislative intention is normally indicated by the use of phrases such as "provided that however." Such an exception removes from the reach of the statute acts that the legislature does not desire to criminalize, even though the acts would arguably come within the broad language of the statute.

A moment's reflection will reveal that the legislature did not really intend to make "A" and "B" a crime, but only "A" and "B" committed in the absence of "X". The statute would be more straightforward if it stated that "A" and "B" would be a crime if "X" were not present.[62] The justifications offered for this rather curious use of language are that "X" is such a rare occurrence or is so difficult for the prosecution to negate that it need not be dealt with by the prosecution unless properly put into issue. Furthermore, the

[61] *See* Sinclair v. State, 161 Miss. 142, 132 So. 581 (1931); State v. Strasberg, 60 Wash. 106, 110 P. 1020 (1910). Although these cases deal with attempts to dispense with the insanity defense, their logic can be profitably used in the context of other traditional defenses.

[62] For example, OHIO REV. CODE § 2905.04(A) makes it a crime to remove a child from the place where he is found with intent to withhold the child from the legal custody of his parent. Subsection (B) makes it an affirmative defense that it was reasonably necessary to do so in order to preserve the child's health. The statute could as easily have said: No person shall move a child from the place where he is found with intent to deprive the parent of custody when it is not reasonable necessary to protect the child.

defendant will generally have easier access to the evidence necessary to prove this exception. These facts make it appropriate for the defendant to bear at least the production burden on the exception. However, since many jurisdictions have not clearly distinguished between the production burden and the persuasion burden, the persuasion burden has also been placed on the defendant.

It is the rule in Ohio that when "an exception or proviso in a criminal statute is a *part of the description of the offense* . . ." it must be disproved by the state as part of its case; however, when "its effect is merely to except specified acts or persons from the operation" of the statute,[63] the state does not bear that burden. For example, in *Moody v. State*[64] the court held that in a prosecution for abortion, proof of an abortion alone was not sufficient; the state was also required to prove that the operation was unnecessary to save the mother's life. On the other hand, in *Hale v. State*,[65] the court implied that in order to convict upon a charge of unauthorized practice of medicine, the state need only prove the rendering of medical care by a person not licensed to do so. The statute in question provided an exception for medical care rendered by an unlicensed person in an emergency, but the state was not required to negate this as part of its case-in-chief.

Given this test, it is no mean task to determine when a proviso is part of the description of the offense and when it merely exempts certain persons. The Ohio supreme court has indicated that the form of the statute does not govern; rather, the court will look to see if the proviso complies with the rationale used to justify the existence of such a practice. Therefore the prosecution will be relieved of its burden only when the exception provided for would be difficult for the state to disprove and when the facts to prove the exception would be readily available to the defense.[66] The difficulty of making this distinction may have led the drafters of the new criminal code to conclude that statutory exceptions upon which the defendant should bear at least the production burden should be clearly labelled as affirmative defenses.[67] In addition the definition of affirmative defense in-

[63] Hale v. State, 58 Ohio St. 676, 51 N.E. 154 (1898) (emphasis added).

[64] 17 Ohio St. 111 (1866).

[65] 58 Ohio St. 676, 51 N.E. 154 (1898).

[66] *See* Moody v. State, 17 Ohio St. 111 (1866). Cheadle v. State, 4 Ohio St. 478 (1855); State v. Dutton, 3 Ohio App. 2d 118, 209 N.E.2d 597 (Ct. App. 1965).

[67] OHIO REV. CODE § 2901.05(C)(1). Examples of provisions containing such affirmative defenses are 2919.01(B) (bigamy), 2921.34(B) (escape), and 2913.03 (unauthorized use of vehicle). Curiously enough, this latter defense really appears to be a negative defense; the defendant is arguing that he reasonably believed that his use of the vehicle was authorized. He is alleging a mistake of fact which negates the state of mind necessary for the crime, *i.e.*, "knowingly."

cludes those excuses which are "peculiarly within the knowledge of the accused."[68]

In the text of some cases it is said that such provisos are a matter of defense which the defendant must raise,[69] but curiously enough no Ohio court appears to have directly ruled upon whether the defendant bears the persuasion burden on these issues or the necessary quantum of proof.[70] Despite this lack of case law, it is probably proper to conclude that Ohio, consistent with its treatment of other affirmative defenses, would require the defendant to prove an exception by a preponderance of the evidence.[71]

Proponents of the Ohio rule can make strong theoretical and practical arguments in support of their position. As a practical matter, if the state must negate all exceptions to a given crime, it may be forced to waste its time on issues that the defendant never intended to raise, and it may find itself hampered by the difficulty of obtaining evidence that by its nature is within the knowledge of the defendant. Theoretically, it can be argued that, as with the confession and avoidance defenses, the state has proved the elements of the crime and the defendant is only seeking to interpose a fact which in no way negates any of those elements. Finally, the Supreme Court has found no consitutional imperfection in such a practice. In *Morrison v. California*,[72] the Court approved a law that required the defendant to prove citizenship to avoid a verdict for the state, after the state had proved that (a) he was in possession of real property and (b) that he was a member of a race ineligible for naturalization. The Court noted that requirement of the state to disprove citizenship would be an intolerable burden, while proof of citizenship would be easy for the defendant.[73]

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[68] OHIO REV. CODE § 2901.05(C)(2).

[69] Hale v. State, 58 Ohio St. 676, 688, 51 N.E. 154, 158 (1898).

[70] *See* State v. Dutton, 3 Ohio App. 2d 118, 209 N.E.2d 597 (Ct. App. 1965).

[71] *See* State v. Casper, 106 Ohio App. 176, 154 N.E.2d 9 (Ct. App. 1958).

[72] 288 U.S. 591 (1932). Actually there were two cases entitled *Morrison v. California*. Both dealt with different sections of California law which governed the ability of individuals of oriental lineage to occupy real property in California. The first case approved the exception discussed in a brief *per curiam* opinion that dismissed the appeal for want of a substantial federal question. The second, 291 U.S. 82 (1934), pointed out that the first opinion had been decided on the "convenience test", but found that the state could not require the defendant to prove his eligibility for naturalization, since it might be as difficult for the defendant to prove that as it would be for the state to prove ineligibility.

Morrison, like *Leland v. Oregon*, was decided prior to the time that the "proof beyond a reasonable doubt" standard was constitutionalized in *Winship*. Therefore it seems proper to argue that the holding of both cases has been discredited to some degree. In fact, Justice Rehnquist may have felt compelled to file a concurring opinion to point to this very fact.

[73] W. LAFAVE & A. SCOTT, *supra* note 18, § 31 at 146-52 discusses *Morrison* and points

It is also probably true that in most cases the legislature could constitutionally dispense with the exceptions that it has granted. For example, the Ohio bigamy statute provides that a five year absence of the accused's spouse preceding the subsequent marriage is an affirmative defense.[74] It is difficult to understand why, if a state may constitutionally dispense with a state of mind as to bigamy,[75] it is required to include such a proviso. Unlike the confession and avoidance type defenses, these exceptions do not enjoy a long history of use, nor are they firmly etched in our scheme of ordered justice. It may be that if some statutes were stripped of their provisos, they would be too broad or vague; however, this would be a problem with only a minority of the statutes.[76]

Refuting such arguments is difficult, because unlike the case of confession and avoidance defenses, it is not possible to rely upon the second conclusion drawn from the discussion of *Wilbur, i.e.* that the state may not dispense with certain distinctions in the criminal law. For purposes of this section, we will assume that the state could remove fact "X" from its statute and criminalize fact "A" done in conjunction with fact "B". This does not however make the first *Wilbur* conclusion inapplicable.

When the legislature makes "X" an exception to the crime of "A" and "B", it has indicated that it does not desire to punish "A" and "B" alone, but only when done in the absence of "X". If this is true, "X" is just as much an element of the crime as "A" and "B". The difference in results is indeed "substantial" within the meaning of *Wilbur*, because if "X" were present the defendant would escape punishment. Such a practical difference should be enough to implicate the *Winship* concerns, *i.e.* preserving the freedom and good name of individuals and avoiding the conviction of innocent persons.

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out the close relationship between presumptions, statutory exemptions, and affirmative defenses. *See also* Ashford & Risinger, *supra* note 37, at 173-74, 186-93, where they reach the same conclusion and note that the only difference between presumptions and assumptions (as they call affirmative defenses) is that in the former the presumption can be dispelled by a minimal amount of evidence by the defense whereas assumptions must be disproved by a preponderance of the evidence. They argue for applying the same constitutional test for validity to assumptions as well as presumptions.

[74] OHIO REV. CODE § 2919.01.

[75] OHIO REV. CODE § 2919.01 prescribes no state of mind for the crime of bigamy. § 2901.21(B) says that unless a section clearly indicates an intent to impose strict liability, recklessness will be read in. It is unclear whether § 2919.01 intended to dispense with any mental element.

[76] Adopting a test which would equate *Winship* "facts" with those which are constitutionally required would force courts to determine what the outer limits of the criminal law are—"a task which . . . courts tend to avoid." W. LAFAVE & A. SCOTT, *supra* note 18, § 21 at 151.

So even though the state could dispense with "X", it has not done so and must live with the structure it has built.[77] Finally, the state's difficulty in negating facts which are particularly within the knowledge of the defendant is not that impressive when one remembers that it is possible to split the burdens of proof so that the defendant need only bear the production burden. In this situation the prosecution can wait until the defense raises the issue. The facts necessary to mount an attack on the defense would then be present so that the prosecution's task would be eased.[78] On balance, it would seem possible to adequately protect the state's and the defendant's interest by requiring the defendant to raise the issue of an exception and its applicability, but require the state to disprove it beyond a reasonable doubt.

In summary it can be said that, in the case of negative defenses, *Winship* requires that the state bear the burden on the elements of the crime. Since these defenses only negate the existence of one of the elements, the state cannot require that the defendant to raise more than a reasonable doubt. In the case of the confession and avoidance type defenses it can be said that (1) these defenses, no matter what they are called, are really an element of the crime charged because as a practical matter their existence will prohibit a conviction; since this produces such a substantial difference in result, *Wilbur* requires that the state bear the persuasion burden, and (2) some of these defenses may be constitutionally required. Finally, it can not be persuasively argued that statutory exceptions are constitutionally required, but they are as a practical matter a part of the crime as defined by the statute, and should be disproved by the state if raised by the defendant.

D. *Insanity*

Up to this point little has been said about what may be the most discussed affirmative defense: insanity. The unusual and uncertain nature of the insanity defense requires that it be discussed separately. Although the insanity defense is often included with the confession and avoidance type defenses, with which it shares many characteris-

[77] In evaluating the "greater includes the lessor" approach, it must be noted too that there is no guarantee that a crime consisting of "A" and "B" alone would be acceptable to the electorate and therefore a politically viable alternative. Ashford & Risinger, *supra* note 37; *see also supra* note 60.

[78] It must be acknowledged that there may be those instances in which even such a procedure would burden the state severely, but they would seem to be rare situations. The Court itself in *Wilbur* seems to hold open the possibility of placing the persuasion burden on the defendant in some rare cases. 95 S. Ct. at 1891-92 n.31.

tics, it is subtly different from those defenses. Furthermore, until it is possible to obtain general agreement as to the theoretical basis for the insanity defense, it is difficult to place it in the framework of the *Wilbur* analysis. No attempt will be made to examine the defense in depth, but only to indicate a general approach to the problem.

Unlike other defenses, there is no general agreement upon why the insanity defense should be recognized by the criminal law.[79] It is often said that we exculpate the legally insane individual because he is not "blameworthy" or "culpable"; but this is not as much an answer to the question as a conclusion. It has been suggested that the insanity defense merely negates the *mens rea* requirement of the criminal law and therefore it is no different from any other negative defense.[80] However, this approach would make the insanity defense unavailable for strict liability crimes, a conclusion that is certainly not generally accepted. Furthermore, it assumes that the mental element of a crime is equivalent to the concept of *mens rea*, which need not be true. Consider the case of a paranoid schizophrenic who "reasonably" believes it is necessary to kill to save his own life. Can it be said that he did not murder within the meaning of the Ohio criminal code,[81] *i.e.* purposely? In this case the actor's cognitive abilities are so deficient that we will not hold him criminally responsible even though the state has proven its case including the mental element beyond a reasonable doubt. If *mens rea* means the mental element of the crime then it is not true that insanity always negates that element. It is true that a mental disease or defect can theoretically negate either the volitional act requirement or the mental element of a crime, and if this is the case it would seem clear that under *Winship* the defense need only raise a reasonable doubt. It is not clear however that all or most jurisdictions, including Ohio, will allow evidence of a mental disease or defect for this purpose.[82]

Being unable to answer the "why" question it will be necessary to content ourselves with the generally accepted rationale for the

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[79] *Compare* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION, 131-35 (1968), *with* Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963).

[80] Goldstein & Katz, *supra* note 79, at 858-65.

[81] OHIO REV. CODE § 2903.02.

[82] People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959) is probably the best known example of a court allowing evidence of a mental disease or defect to negate the mental element of a crime. Leland v. Oregon, 343 U.S. 790, 794 (1952) notes that, if used as a negative defense, the state could not make the defendant prove insanity beyond a reasonable doubt. The Ohio supreme court has not ruled on the *Gorshen* question but dictum indicates it would not allow evidence of a mental disease or defect to negate the mental element. State v. Staten, 18 Ohio St. 2d 13, 20, 247 N.E.2d 293, 298 (1969).

insanity defense, *i.e.* that the actor is not "blameworthy." This is the conclusion reached by the Ohio supreme court in *State v. Staten*, in which the court said that "one, who does not know that his action is wrong or does not have the capacity to avoid such action, is not a proper subject for punishment."[83] Viewed in this manner, the insanity defense has much in common with the confession and avoidance type defenses in that the defendant seeks to interpose a fact that will bar the imposition of the criminal sanction, even though the prosecution has proved the elements of the crime beyond a reasonable doubt. The defense is unlike the other confession and avoidance defenses in that it focuses on the nature and quality of the actor and not upon the objective circumstances of the crime. The similarity, however, has led many courts, including the Ohio supreme court, to conclude that the defendant must prove insanity by a preponderance of the evidence.[84]

The argument in favor of this rule is the same that is offered to support it in the context of the confession and avoidance type defenses. Mr. Justice Rehnquist stated it succinctly in *Wilbur*, when he expressed his belief that the *Wilbur* holding was not inconsistent with *Leland v. Oregon.*

> Oregon's placement of the burden of proof on insanity on Leland, unlike Maine's redefinition of homicide in the instant case, did not effect an unconstitutional shift in the State's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense . . . . Having once met that rigorous burden of proof . . . the State could quite consistently with such a constitutional principle conclude that a defendant who sought to establish the defense of insanity, and thereby escape any punishment whatever for a heinous crime, should bear the laboring oar of such an issue.[85]

It must be suggested, however, that this argument does not adequately reflect the principles which underlie the Court's decision in *Wilbur*. While it is true that in most cases the insanity defense will not allow the defendant to escape a deprivation of his personal freedom, it does prevent the stigma of a criminal conviction. Furthermore, of all the defenses, the insanity defense is most directly concerned with the culpability of the defendant. Because of the kind of person the actor is, we have historically held that he is not a proper subject for the criminal sanction; society believes that he is not blame-

[83] 18 Ohio St. 2d at 20, 247 N.E.2d at 298.
[84] *Id.* at 13, 247 N.E.2d at 294.
[85] 95 S. Ct. at 1893 (concurring opinion).

worthy and the goal of the criminal law is to affix a sentence of moral condemnation.[86] Before a defendant can be convicted the issue of insanity must be decided, either based upon an unrebutted assumption or through proof. Finally, the insanity defense may be a defense which the criminal law cannot fail to recognize. Given the long use of the defense and its intimate relationship with the functional basis of the criminal law, due process may require that this defense be retained.[87]

In summary, it can be suggested that the sanity of the defendant should be considered as an element of every crime, because in the absence of his sanity we believe that the defendant is not a proper subject for the criminal sanction. In every case then, the elements of a crime include not only those set out in the statutory definition of the crime but also the defendant's sanity at the time of the act. It may be proper for the state to assume that the defendant is sane, but once the issue is raised the state must prove the sanity of the defendant beyond a reasonable doubt.

V. CONCLUSION

This note, like all theoretical analysis, must be based upon an assumption, and from this assumption the course of the discussion must necessarily flow. Since assumptions are in essence beliefs, they cannot be proven but only stated. The belief underlying this note is simply that the criminal sanction is the most severe control mechanism society can impose and therefore should be invoked only for the most injurious antisocial behavior and that when society does seek to use it, society must justify its use by proof of the highest order.

Our society must, if it is to survive, protect its individual members against injury in all its forms and degrees; however, at the same time we are dedicated to insuring that each individual enjoy the maximum amount of personal freedom. The two goals often come into conflict, and society's control mechanisms act at various levels to balance these interests. It is no wonder then that the conflict should be most intense in the criminal law because the criminal sanction is at the same time society's most effective form of self protection and the most destructive of individual freedoms.[88]

At a time when other social control mechanisms seem to be losing their effectiveness, efforts are being made to impose the crimi-

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[86] *See* H. PACKER, *supra* note 75, at 131-35.

[87] *See* cases cited *supra*, note 61.

[88] *See* H. PACKER, *supra* note 75, at 63-70.

nal sanction for more and different types of anti-social behavior, and to argue that proof of criminality should be made easier. It may be, as some have suggested, that the legal pendulum has swung too far away from protecting the victims of brutal crimes and too far towards protecting the rights of the criminal.[89] There are probably few among us who feel a great deal of compassion for the deprivations suffered by the "true criminal," but we must remember that the title of "criminal" is to be applied only at the end of society's imperfect guilt adjudication process. To the extent that we make the burden of the prosecution easier we make it that much more likely that the title of "criminal" will be affixed upon the names of innocent people. It must be acknowledged that at some point theory must give way to human practicality or else theory would dictate that no one should be tried for fear of making an error.[90] In the case of "affirmative defenses," however, the balance should be struck in favor of placing the persuasion burden on the prosecution.

Stephen D. Brandt

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[89] F. CARRINGTON, THE VICTIMS (1975).

[90] Christie & Pye, *supra* note 59.